20

Office - Supreme Court, U. S.
FILED
MAY 13 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 1023

BENJAMIN MALTZ, AN INDIVIDUAL DOING BUSINESS AS EXCEL MANUFACTURING COMPANY,
Petitioner,

vs.

GEORGE D. SAX, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MYER N. ROSENGARD,
Counsel for Petitioner.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

	PAGE
PETITION	1
Summary statement of the matters involved	2
Questions presented	2-4
Reasons for the allowance of the writ	5
Conclusion	6
BRIEF IN SUPPORT OF PETITION	7-15
Opinions below	7
Jurisdiction	7
Specification of errors	8
SUMMARY OF ARGUMENT:	
A. The Circuit Court of Appeals has refused to accept the admonitions of this court and has declared a public policy of the United States which imposes sanctions upon plaintiffs bringing civil proceedings for treble damages under the Sherman Anti-Trust Act, contrary to a proper interpretation of the legislative intent	9
B. The Circuit Court of Appeals has declared it to be the common law public policy of the United States that gambling per se is against such a national policy, and, therefore, that the manufacture, sale and distribution of such devices are contrary to public policy. There is no common law public policy of the United States making unlawful the manufacture and distribution of gambling devices. The pronouncement of the Court of Appeals represents judicial fiat and defies basic constitutional precepts	11
C. The parties to this cause are not in *particeps criminis,* nor does the plaintiff come into court with "unclean hands."	14

PAGE

CASES AND AUTHORITIES CITED.

Apex Hosiery Co. v. Leader, 310 U. S. 485 9
DaCosta v. Jones (1778) 2 Cowp. 728 12
Dietrick v. Greaney, 309 U. S. 190 10
D'Oench Duhme & Co. v. F.D.I.C., 315 U. S. 447 10
Exparte Wilson, 114 U. S. 417 12
Federal Trade Comm'n. v. Keppel Bros., 291 U. S. 304 13
Frost v. Mines Corp., 312 U. S. 38 10
Gilbert v. Sykes (1812) 16 East 150 12
Gillman v. Stern, 114 Fed. (2d) 28 15
Hinderlider v. LaPlata Co., 304 U. S. 92 10
Hodgson v. Temple (1913) 5 Taunt 181 12
Keystone Co. v. Excavator Co., 290 U. S. 240 ..... 6, 8, 15
Maddox v. United States, 156 U. S. 237 12
Morgan v. Pettit, 4 Ill. 529 12
People v. Monroe, 349 Ill. 270 13
Roseland v. Phister Mfg. Co., 125 Fed. (2d) 417 ..... 4, 6
Smith v. Alabama, 124 U. S. 465 12
Smith v. Aiery (1704) 6 Mod. 128 12
Standard Oil Co. v. United States, 221 U. S. 1 12
Tigner v. Texas, 310 U. S. 141 11
United States v. Cooper Corp., 312 U. S. 600 11
United States v. Socony Vacuum Oil Co., 310 U. S. 213 9
Woerter, Rec'r. v. Lamson, 380 Ill. 35 13

STATUTES CITED.

Secs. 1 and 15, Title 15, U.S.C. (Sherman Anti-Trust Act) 1, 9
Sec. 347, Title 28, U.S.C. (Sec. 240, Judicial Code) 7
Vol. 8, Compiled Statutes of England, 1104 12

OTHER AUTHORITIES CITED.

Vol. 22, Opinions of the Attorney General of the United States, p. 196 10
Vol. 25, English and Empire Digest, 396 12
Common Law and our Federal Jurisprudence, 74 Univ. of Pa. Law Rev., 270 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No.

BENJAMIN MALTZ, AN INDIVIDUAL DOING BUSINESS AS EXCEL MANUFACTURING COMPANY,

Petitioner,

vs.

GEORGE D. SAX, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Judges of the Supreme Court of the United States:

Now comes the petitioner, Benjamin Maltz, individually doing business under the trade name of Excel Manufacturing Company and respectfully petitions this Honorable Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, and to bring to this Honorable Court, for review, the record and proceedings had and taken in said United States Circuit Court of Appeals, for the Seventh Circuit.

I.

Summary Statement of Matters Involved.

The record here poses the following question:

> Is there a common law public policy of the United States which *per se* makes the manufacture, sale and distribution of gambling devices unlawful; and which compels the courts of the United States to refuse to entertain an action brought by a manufacturer of such devices against competitors, for treble damages under the Sherman Anti-Trust Act?

It is conceded that the case involves solely an issue of public policy of the United States distinguished from State policy; that neither the Sherman Anti-Trust nor any other legislative enactment of Congress declares that the manufacture, sale and distribution of gambling devices are unlawful. It was neither asserted nor did the trial court or reviewing court consider that a decision in the case involves the lottery statutes of the United States, or any application of these statutes. The question therefore involves solely one of common law public policy of the United States distinguished from what might be the policy of the State of Illinois or any other State. The Sherman Anti-Trust Act itself does not impose the sanctions which were imposed by the trial court and the Circuit Court of Appeals.

The cause is a proceeding brought in the District Court, for the Northern District of Illinois, for the recovery of treble damages under the Sherman Anti-Trust Act (Title 15, U.S.C., Secs. 1 and 15). In his complaint the plaintiff asserted that he and all of the defendants are competitors, engaged in the manufacture and sale and distribution, in interstate commerce, of what he termed "sales boards"; that the defendants control in excess of 65% of the total

volume of sales of the product in the United States (Rec. p. 4). He charged that the defendants, some years prior to his coming into the business and entering the field of competition, had banded themselves together into an association (without name and without public or avowed purpose) for the actual purpose of controlling the price to be paid by the wholesalers and distributors throughout the United States (Rec. pp. 5-7). Shortly prior to the filing of the complaint the defendants, by concerted and agreed action, decided to put the plaintiff out of business and to stifle his competition. The following took place: Defendants set up a dummy sales organization which they called "Standard Board Company." This dummy company proceeded to offer to the trade (and through salesman employed by the defendants themselves) items similar to the ones manufactured by the plaintiff at a price below cost to the plaintiff, as well as below cost to the defendants (Rec. pp. 8-10). Such a program had previously been adopted by the defendants as to other competitors. The result was that the plaintiff lost a large number of orders which had previously been placed, and plaintiff found himself with a large quantity of manufactured product and raw materials on his hands which he could not sell. He charges that he suffered damage (detailed in the complaint, Rec. p. 10) in the sum of $15,000.00.

Defendants confessed these factual assertions by filing a motion to strike the complaint and to dismiss the action. The only specification of objection made by them in their attack upon the complaint was that the plaintiff was engaged in the manufacture of a gambling device, viz., "punch boards," and they urged that such a business was contrary to the public policy of the United States; that, therefore, the plaintiff had no standing in the courts of the United States and his action should be summarily dismissed (Rec. p. 12).

The trial court (without opinion) sustained the motion and dismissed the complaint (Rec. p. 17). On appeal to the Circuit Court of Appeals for the Seventh Circuit, that court affirmed the dismissal order (Rec. p. 38), in an opinion written by Judge Evan Evans. That court stated that both the plaintiff and the defendants were engaged in an unlawful business and were in *particeps criminis;* or that the plaintiff came into court with unclean hands and should not be permitted to maintain this suit (Rec. p. 34). This conclusion was based upon the premise or assumption that the plaintiff was engaged in a business, to-wit: the manufacture, sale and distribution of a gambling device, against the public policy of the United States. Having made this assumption, the court then proceeded to argue that the plaintiff and the defendantsc were in *particeps criminis,* etc. Such assumption or premise was made without the citation of other authority and appears in the opinion in the following language (Rec. p. 34):

> "Our question is whether one engaged in the business of making and selling gambling devices, *the use of which is against public policy and unlawful,* may recover damages under the Sherman Anti-Trust Act for a 'violation of his legal right' * * * (Italics ours).

The foregoing decision and opinion of the Circuit Court of Appeals, in principle, is contrary to a decision and opinion of that court (filed February 5, 1942) in the case of *Roseland* v. *Phister Mfg. Co.,* 125 Fed. (2d) p. 417. In the cited case that court said, "it is the source of injury not the character of property or business injured which constitutes the test of recovery."

In the case at bar, the Court of Appeals disregarded the question of the source of injury but imposed sanctions upon the plaintiff.

As a result of this pronouncement in the instant case, it certainly follows that if put to the test the Court of Appeals would be compelled to hold that all persons, suppliers of raw materials, common carriers, etc., are compelled to deal with people engaged in this business with caution, and that those dealing with persons engaged in this business, knowing that they are manufacturing the particular gambling device, have no standing and cannot maintain civil actions in the Courts of the United States, either on the basis of being in *particeps criminis* with them, or run the risk of being declared to come into the courts of the United States with unclean hands. Such doctrine is far reaching when it it considered that all but two of the respondents maintain their plants and principal places of business in the Seventh Circuit, to-wit: in the City of Chicago (Rec. p. 4). These four defendants manufacture and distribute by far and large the major part of this product throughout the United States.

II.

The Reasons for the Allowance of the Writ.

Petitioner respectfully submits to this Court that he is entitled to be heard in this Court for the following reasons:

(a) Because the Circuit Court of Appeals assumed the existence of a public policy of the United States which does not exist, to-wit: that the manufacture, sale and distribution of gambling devices are unlawful and against such public policy;

(b) Because the Circuit Court of Appeals, for the Seventh Circuit, by assuming the existence of a public policy, in truth itself declared such public policy; that such a declaration of policy by a court of the United States defies the constitutional division of powers between the legislative and judicial branches of the government;

(c) Because the Circuit Court of Appeals declared the doctrine of unclean hands to be applicable to the facts in the case at bar, contrary to the doctrine as enunciated by this Court in *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240;

(d) Because the Circuit Court of Appeals declared that the plaintiff was in *particeps criminis* with those who bought his gambling devices when neither the petitioner nor his purchasers were guilty of any crime under any act of the Congress of the United States. Such a declaration of doctrine by the Circuit Court of Appeals defies fundamental precepts, to-wit: that there are no common law crimes against the United States; and that the only crimes against the United States are those created by enactments of the Congress;

(e) Because the decision and opinion of the Circuit Court of Appeals is contrary to the decision and opinion of that court in *Roseland* v. *Phister Mfg. Co.*, 125 Fed. (2d) p. 417.

CONCLUSION.

For the foregoing reasons, petitioner respectfully submits that substantial federal questions are involved in this case; that by reason thereof and the matters and things hereinabove set forth and as prayed for herein, a Writ of Certiorari should be allowed by this Honorable Court.

MYER N. ROSENGARD,
Counsel for Petitioner.